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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED FARM WORKERS, PESTICIDE)
ACTION NETWORK NORTH AMERICA,) Case No. 08-3595-SBA
PINEROS Y CAMPESINOS UNIDOS DEL)
NOROESTE, BEYOND PESTICIDES,)
TEAMSTERS LOCAL 890, FARM LABOR) FIRST AMENDED COMPLAINT FOR
ORGANIZING COMMITTEE, AFL-CIO, and) DECLARATORY AND INJUNCTIVE
LUIS GARCIA LOPEZ,) RELIEF

Plaintiffs,)

v.)

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)

Defendant.)

1 1. This is an action for declaratory judgment and injunctive relief concerning the
2 pesticide diazinon. It arises under and asserts violations of the Federal Insecticide, Fungicide,
3 and Rodenticide Act (“FIFRA”), 7 U.S.C. §§ 136-136y, and the Endangered Species Act
4 (“ESA”), 16 U.S.C. §§ 1531-1544.¹

5 2. Diazinon is a toxic organophosphate pesticide. The American public, including
6 infants and children, are exposed to diazinon that drifts in the ambient air following application
7 and contaminates food and drinking water. Farmworkers are additionally exposed to diazinon
8 when they mix, load, or apply the pesticide in fields or re-enter treated fields after application.
9 Diazinon contaminates the environment and poisons wildlife including threatened and
10 endangered species.

11 3. The United States Environmental Protection Agency (“EPA”) has recognized that
12 diazinon uses pose considerable risks to farmworkers and wildlife. However, without
13 completing the required ESA consultations, EPA determined that diazinon uses are eligible for
14 reregistration under FIFRA because the benefits outweigh the risks. In reaching this
15 reregistration determination, EPA failed to put the burden of proving reregistration eligibility on
16 the pesticide registrants and, instead, relied on incomplete and inaccurate risks and benefits
17 assessments that significantly understate the risks of diazinon uses and exaggerate the benefits of
18 the pesticide.

19 4. Plaintiffs seek a judgment declaring that EPA acted arbitrarily, capriciously, and
20 in violation of FIFRA in determining that diazinon was eligible for reregistration and in
21 maintaining the registrations for diazinon. Plaintiffs also seek an injunction that (1) requires
22 EPA to make new reregistration eligibility decisions for diazinon based on a balancing of risks
23

24 ¹ On May 27, 2008, plaintiff Beyond Pesticides sent a 60-day notice of intent to sue for EPA’s
25 failure to comply with the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, with
26 respect to its reregistration of diazinon and maintenance of the diazinon registration. More than
27 60 days have passed since EPA received that notice, yet EPA has neither responded to the notice
28 nor taken action to correct the ESA violations identified therein. Plaintiffs therefore amend their
complaint pursuant to Fed. R. Civ. P. 15(a) to add a cause of action for violations of the ESA.

1 and benefits under FIFRA's unreasonable adverse effects standard that fully incorporate the
2 health, environmental, economic, and social risks and benefits of each diazinon use; (2) prohibits
3 EPA from reregistering uses of diazinon unless the pesticide registrants prove that the benefits of
4 the pesticide use outweigh the specific risks associated with that use; and (3) imposes interim
5 protective measures to prevent harm to farmworkers, children, other bystanders in agricultural
6 communities near areas where diazinon is used until EPA brings its diazinon registrations into
7 compliance with the law.

8 5. Additionally, EPA did not initiate and complete ESA section 7(a)(2) consultations
9 with the United States Fish and Wildlife Service ("FWS") and the National Marine Fisheries
10 Service ("NMFS") (collectively "the Services") on its diazinon reregistration to ensure that its
11 registered diazinon uses will not jeopardize the survival and recovery of threatened and
12 endangered species and will not adversely modify their designated critical habitat. This action
13 seeks a judgment declaring that EPA has violated ESA section 7(a)(2) by reregistering and
14 allowing continued use of diazinon without completing consultations with the Services and
15 without ensuring that the registered diazinon uses will not jeopardize listed species and will not
16 adversely modify their designated critical habitat. Plaintiffs seek an order (1) compelling EPA to
17 initiate and complete consultations with the Services regarding the effects of diazinon on
18 threatened and endangered species; and (2) granting interim protective measures to prevent harm
19 to listed species and their designated critical habitat until the consultation process is complete
20 and EPA brings the diazinon registrations into compliance with the ESA.

21 JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT

22 6. This action is brought pursuant to section 16(a) of FIFRA, 7 U.S.C. § 136n(a), and
23 section 11(g)(1) of the ESA, 16 U.S.C. § 1540(g)(1). This Court has jurisdiction pursuant to
24 7 U.S.C. § 136n(a), 16 U.S.C. § 1540(g)(1), and 28 U.S.C. § 1331. As required by the ESA
25 citizen suit provision, plaintiff Beyond Pesticides provided a 60-day notice of intent to sue on
26 May 27, 2008, to the Services and defendant EPA. A copy of the 60-day notice is appended as
27

1 Exhibit A.

2 7. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) and 16 U.S.C.
3 § 1540(g)(3) as a number of the plaintiffs reside in this district and many of the consequences of
4 the defendant's violations of the law giving rise to the claims occurred or will occur in this
5 district.

6 8. This case is properly assigned to the San Francisco/Oakland Division under Civil
7 L.R. 3-2(c) because at least one of the plaintiffs is located in San Francisco County.

8 PARTIES

9 9. The plaintiffs in this action are:

10 A. United Farm Workers ("UFW"), the nation's oldest and largest farmworker
11 membership organization. UFW is headquartered in California and serves farmworkers in
12 offices all across the country including offices in Salinas and Santa Rosa, California. UFW has
13 represented farm workers for more than 40 years and currently has more than 27,000 members,
14 many of whom are migrant and seasonal farmworkers. UFW's mission is to protect and expand
15 farmworkers' labor rights, including rights pertaining to health and safety issues. UFW works to
16 protect the health and safety of farmworkers from occupational injuries, including injuries
17 caused by exposure to diazinon and other pesticides.

18 B. Pesticide Action Network North America ("PANNA"), a San Francisco-based
19 non-profit organization that serves as an independent regional center for Pesticide Action
20 Network International, a coalition of over 600 public interest organizations in more than 90
21 countries. For more than 20 years, PANNA has worked to replace hazardous and unnecessary
22 pesticide uses with ecologically sound pest management across North America. PANNA
23 provides scientific expertise, public education, and access to pesticide data and analysis, policy
24 development, and other support to its approximately 225 member organizations. PANNA has
25 approximately 2,700 individual members nationwide and approximately 90 organizational
26 members in California alone. PANNA's U.S. membership includes a number of groups who
27

1 directly represent or advocate on behalf of farmworkers and whose membership includes
2 farmworkers and persons living on or near farms. PANNA submitted comments to EPA on the
3 2006 organophosphates cumulative risk assessment and the 2002 interim reregistration eligibility
4 decision for diazinon.

5 C. Pineros y Campesinos Unidos del Noroeste (Northwest Treeplanters and
6 Farmworkers United or "PCUN"), based in Woodburn, Oregon, the state's only union of
7 farmworkers, nursery, and reforestation workers. Its mission is to establish better working and
8 living conditions for its members, who work on crops treated with diazinon, and live in
9 communities where this pesticide drifts and is tracked in following application.

10 D. Beyond Pesticides, a nonprofit membership organization that serves a nationwide
11 network of individuals and groups working to increase the safe use of pesticides and reduce or
12 end the use of dangerous chemicals such as diazinon. Beyond Pesticides is based in Washington,
13 D.C., and has more than 2,000 individual and organizational members in California and other
14 states. The organization advocates on behalf of farmworkers, individuals, and communities
15 exposed to pesticides such as diazinon and also seeks to protect wildlife and ecosystems from the
16 harmful effects of diazinon and other pesticides. Beyond Pesticides' primary goal is to assist
17 individuals and organizations in identifying the hazards of pesticides, providing information on
18 safer alternatives, and promoting policy changes that increase the protections to humans and the
19 environment from dangerous pesticides. Beyond Pesticides has long campaigned for more
20 stringent regulation of diazinon. For example, on December 17, 2002, Beyond Pesticides
21 submitted comments that critiqued the EPA's diazinon interim reregistration decision. Beyond
22 Pesticides has also published fact sheets on the dangers of diazinon and has orchestrated public
23 letter writing campaigns urging EPA to cancel diazinon uses.

24 E. Teamsters Local 890, a union founded in 1943 that represents approximately
25 10,000 workers in California and Arizona, including 2,000 agricultural workers in the Salinas
26 Valley, Oxnard area, Huron area, and Imperial Valley in California, as well as the Yuma area of
27 Arizona. The Union negotiates contracts to improve the members' wages and working

1 conditions and works to protect its members from pesticide exposures and provide health care to
2 farm workers and their families. Local 890's members include workers who have harvested and
3 will continue to harvest vegetables treated with diazinon. Local 890's members and their
4 families also live and go to school in areas where diazinon drifts and settles.

5 F. Farm Labor Organizing Committee, AFL-CIO ("FLOC"), a national union that
6 represents migrant and seasonal farmworkers. It was founded in 1968 and is based in Toledo,
7 Ohio. FLOC's mission is to organize farmworkers so that they can secure more power to
8 improve their working conditions, including reducing their exposure to pesticides. FLOC
9 currently has approximately 12,000 members in Ohio, Michigan, North Carolina, and Virginia.
10 FLOC members work with many crops that are registered to receive diazinon treatments,
11 including apples, blueberries, cucumbers, onions, peppers, potatoes, strawberries, and tomatoes.

12 G. Luis Garcia Lopez, an individual farmworker who has supported himself and his
13 family for many years by working in agricultural fields in California. He has been exposed to
14 diazinon and other pesticides while working in and around fields in Monterey County.
15 Mr. Lopez plans to continue working in agriculture and is at risk of future exposure to diazinon
16 and other pesticides.

17 10. Plaintiffs have been and will continue to be injured when their members mix,
18 load, and apply diazinon for agricultural purposes; prune, thin, or harvest crops that contain
19 residues of diazinon; and work or live in areas where diazinon drifts and settles. Every year,
20 plaintiffs' members are exposed to diazinon at levels that may cause poisoning. The continued
21 exposure of the plaintiffs' members to the harmful effects of diazinon are a direct result of EPA's
22 decisions to reregister diazinon uses.

23 11. Plaintiff Beyond Pesticides and its members live, use, and recreate in areas near
24 where diazinon is applied or where diazinon has traveled. Beyond Pesticides and its members
25 have professional, economic, aesthetic, and recreational interests that have been and will
26 continue to be injured by the reregistration of diazinon uses and the impacts that this pesticide
27 has and will continue to have on beneficial insects and threatened and endangered species.

12. The past, present, and future enjoyment of these interests by plaintiffs and their members have been, are being, and will continue to be irreparably harmed by EPA's disregard of its statutory duties and by the unlawful injuries imposed on farmworkers, children and other bystanders, and the environment.

13. The aesthetic, conservation, recreational, commercial, and scientific interests of plaintiffs and their members in minimizing harm to people and the environment from the use of diazinon, as well as in the compliance with environmental law by federal agencies, have been, are being, and, unless the relief prayed for is granted, will continue to be directly and adversely affected by the failure of defendants to comply with the law.

14. The defendant in this action is the United States Environmental Protection Agency, an agency of the United States charged with registering and reregistering pesticides under FIFRA and with ensuring that the authorized pesticide uses will not pose unreasonable risks to humans or the environment. EPA is also charged with ensuring, through consultation with the Services, that pesticide registrations will not jeopardize the survival and recovery of listed species or destroy or adversely modify their designated critical habitat.

BACKGROUND

I. STATUTORY FRAMEWORK FOR REGISTERING AND REREGISTERING PESTICIDES

A. Federal Insecticide, Fungicide, and Rodenticide Act Requirements

15. FIFRA establishes a registration scheme for pesticides. Under FIFRA, a pesticide may generally not be sold or used in the United States unless it has an EPA registration for a specified use. 7 U.S.C. § 136a(a). To register or reregister a pesticide, EPA must determine that:

- (A) its composition is such as to warrant the proposed claims for it;
- (B) its labeling and other material required to be submitted comply with the requirements of this Act;
- (C) it will perform its intended function without unreasonable adverse effects on the environment; and

1 (D) when used in accordance with widespread and commonly recognized practice it
2 will not generally cause unreasonable adverse effects on the environment.

3 7 U.S.C. § 136a(c)(5).

4 16. FIFRA defines “unreasonable adverse effects on the environment” to mean “any
5 unreasonable risk to man or the environment, taking into account the economic, social, and
6 environmental costs and benefits of the use of any pesticide” 7 U.S.C. § 136(bb). In order
7 for EPA to register or reregister a pesticide use, it must find that the use will not pose any
8 unreasonable adverse effects because the benefits of the pesticide uses outweigh the risks.

9 17. FIFRA also defines “unreasonable adverse effects on the environment” to include
10 any human dietary risk that is not “safe” under the Federal Food Drug and Cosmetic Act
11 (“FFDCA”), 21 U.S.C. §§ 301-394, as amended by the Food Quality Protection Act (“FQPA”),
12 Pub. L. No. 104-170, 110 Stat. 1489 (1996). 7 U.S.C. § 136(bb). The FFDCA, as amended,
13 defines “safe” as “a reasonable certainty that no harm will result from aggregate exposure to the
14 pesticide residue, including all anticipated dietary exposures and all other exposures for which
15 there is reliable information.” 21 U.S.C. §§ 346a(b)(2)(A)(i)-(ii).

16 18. The culmination of the registration process is EPA’s approval of both a
17 registration and a label for the particular pesticide use. FIFRA makes it unlawful to use a
18 pesticide in a manner inconsistent with the label, 7 U.S.C. § 136j(2)(G), or to make any claims
19 that differ substantially from the label, 7 U.S.C. § 136j(1)(B).

20 19. EPA has the authority to cancel a pesticide registration whenever the “pesticide or
21 its labeling or other material required to be submitted does not comply with the provisions of
22 [FIFRA] or, when used in accordance with widespread and commonly recognized practice,
23 generally causes unreasonable adverse effects on the environment” 7 U.S.C. § 136d(b).

24 20. EPA separately categorizes and assesses risks to farmworkers, children and
25 bystanders (non-occupational risks), and wildlife. For farmworker risks, EPA typically uses a
26 methodology that combines exposure estimates, toxicity assessments, and uncertainty factors to
27 determine whether a particular pesticide use poses a “risk of concern” to farmworkers, which it
28

1 has also called an “unacceptable risk.” When EPA determines that a pesticide use presents a risk
2 of concern to farmworkers, it generally prescribes mitigation measures including use of personal
3 protective equipment (such as chemical resistant clothing and respirators), and engineering
4 controls (such as closed pesticide mixing, loading, and application systems designed to reduce
5 contact with the poisons).

6 21. For children and bystanders, both FIFRA and the FFDCA require EPA to evaluate
7 potential exposures from dietary sources and from other non-occupational routes. EPA generally
8 uses the “reasonable certainty of no harm” standard set forth in the FFDCA to assess dietary
9 risks to children and bystanders; however, EPA typically does not consider or assess the risks to
10 children and bystanders from exposure to pesticides that drift into communities following
11 application under either the FIFRA or FFDCA standard.

12 22. For wildlife, EPA typically establishes ecological risks of concern based on
13 laboratory toxicity studies and environmental fate modeling. When EPA identifies a risk of
14 concern for wildlife, the agency sometimes prescribes mitigation measures including no-
15 application buffer zones around sensitive areas, reductions in permitted number of seasonal
16 applications, and reductions in maximum application rates.

17 23. Under FIFRA’s risk-benefit standard, EPA cannot allow pesticide uses that result
18 in human or ecological risks to persist unless the pesticide registrant proves that, considering all
19 risks and benefits, the benefits of the pesticide use outweigh the risks.

20 24. EPA has no regulation or policy establishing a uniform process for assessing the
21 benefits of pesticide uses that pose risks of concern to humans and/or wildlife. Expert bodies,
22 such as the National Academy of Sciences, have recommended that EPA develop such a policy
23 to avoid arbitrary and unprincipled risk-benefit decisionmaking under FIFRA. In the absence of
24 such a regulation or policy, EPA staff compiles information on the risks and benefits of
25 pesticides on an *ad hoc* basis.
26
27
28

B. Endangered Species Act Mandates

25. Section 7(a)(2) of the ESA requires federal agencies to “insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical.” 16 U.S.C. § 1536(a)(2).

26. Section 7 establishes an interagency consultation process to assist federal agencies in complying with their duty to ensure against jeopardy to listed species or destruction or adverse modification of critical habitat. An agency must initiate consultation with NMFS or FWS under section 7 whenever it takes an action that “may affect” a listed species. 50 C.F.R. § 402.14(a). The threshold for a “may affect” determination and required ESA section 7 consultation is low. See 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (“Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement.”).

27. As a result of consultation, the federal agency will obtain either a written concurrence letter from NMFS or FWS that the proposed action is “not likely to adversely affect” listed species or their habitat, 50 C.F.R. §§ 402.13, 402.14(b)(1), or a biological opinion evaluating the effects of the federal action on listed species and their critical habitat. 50 C.F.R. § 402.14(a). If NMFS or FWS concludes that a proposed action is likely to jeopardize a listed species or result in adverse modification of its critical habitat, NMFS or FWS must propose a reasonable and prudent alternative, if available, that will mitigate the proposed action so as to avoid jeopardy and/or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3).

28. Separately, ESA section 7(d) prohibits federal agencies, after the initiation of consultation under section 7(a)(2), from making any irreversible or irretrievable commitment of resources if doing so would foreclose the implementation of reasonable and prudent alternatives. 16 U.S.C. § 1536(d).

29. Federal agencies and the Services must use the best available science and commercial data in their section 7(a)(2) consultations. 16 U.S.C. § 1536(a)(2).

1 II. DIAZINON

2 A. History and Usage

3 30. Diazinon is an organophosphate insecticide that was first registered for use in
4 1956. Like other organophosphate pesticides, diazinon originates from nerve gases developed by
5 the Nazis during World War II.

6 31. Today, diazinon is one of the most widely used organophosphate insecticides in
7 the United States. EPA estimates that total annual domestic usage of diazinon was over 13
8 million pounds of active ingredients between 1987 and 1997. Diazinon is currently registered
9 for use on a wide variety of crops including almonds, apples, apricots, beets, beans, blueberries,
10 broccoli, Brussels sprouts, cabbage, caneberries, carrots, cauliflower, celery, chard, cherries,
11 collards, cranberries, cucumbers, endive, figs, filberts, ginseng, kale, lettuce, melons, mustard
12 greens, nectarines, onions, ornamentals, parsley, parsnips, peaches, pears, peas, peppers,
13 pineapples, plums, potatoes, prunes, radishes, rutabagas, strawberries, spinach, tomatoes, trunk
14 wraps, turnips, and watercress.

15 32. In 1989, FWS issued a biological opinion for the then-registered diazinon uses.
16 FWS determined diazinon jeopardized 84 threatened and endangered aquatic species and four
17 listed avian species. Diazinon IRED at 31. FWS prescribed mitigation measures to avoid
18 jeopardizing such species. Diazinon IRED at 31. On information and belief, EPA never
19 implemented the mitigation prescribed in the 1989 biological opinion. Diazinon IRED at 32.

20 33. Pursuant to court orders, EPA has begun to initiate ESA section 7(a)(2)
21 consultations on the effects of diazinon on listed salmon and steelhead populations, the
22 California red-legged frog, and the Barton Springs salamander. However, EPA has allowed
23 diazinon uses to continue that may affect those species even though the ESA consultations are
24 not complete.

25 34. On July 31, 2008, pursuant to a settlement agreement, NMFS released a draft
26 biological opinion responding to EPA's initiation of consultation on the effects of diazinon and
27 two other organophosphate insecticides on listed salmon and steelhead. In that draft, NMFS

1 questioned many of EPA's methodologies for assessing the impacts of diazinon on salmon and
2 steelhead, and determined that EPA's reregistration of diazinon "is likely to jeopardize the
3 continued existence" of 28 different threatened and endangered salmon and steelhead
4 populations. Draft Biological Opinion on EPA's Registration of Pesticides Containing
5 Chlorpyrifos, Diazinon, and Malathion at 303. NMFS noted that EPA's consultation under
6 section 7(a)(2) of the ESA "remains incomplete until it analyzes the effects of its authorization of
7 pesticide product labels with ... diazinon ... for all remaining threatened and endangered species
8 under NMFS jurisdiction." Id. at 39.

9 B. Toxicity and Environmental Fate

10 35. Diazinon is toxic to humans. Like other organophosphates, diazinon causes
11 systemic illnesses by inhibiting the ability to produce cholinesterase, an enzyme necessary for
12 the proper transmission of nerve impulses. Symptoms of cholinesterase inhibition include
13 muscle spasms, confusion, dizziness, loss of consciousness, seizures, abdominal cramps,
14 vomiting, diarrhea, cessation of breathing, paralysis, coma, and death. Scientific studies also
15 associate diazinon exposures with several other ailments including endocrine disruption, birth
16 defects, nerve damage, liver damage, asthma, gestational diabetes, and non-Hodgkin's
17 lymphoma.

18 36. Diazinon has both lethal and sub-lethal effects on wildlife. Birds, particularly
19 grazing fowl like ducks and geese, are highly susceptible to diazinon poisoning, and diazinon has
20 been linked to hundreds of reported bird kills. Indeed, according to EPA's Ecological Incident
21 Information System, diazinon has caused the second largest number of total known incidents of
22 bird mortality of any pesticide. Diazinon is also lethal to aquatic life and, according to peer-
23 reviewed studies, low concentrations of diazinon in surface water can have sub-lethal effects on
24 fish, including impairment of homing ability, reproduction, and predator avoidance. In the draft
25 biological opinion released on July 31, 2008, NMFS determined salmon and steelhead "survival,
26 reproduction, migration, and growth are all significantly reduced by" EPA's registration of
27

1 diazinon and two other organophosphates. Draft Biological Opinion on EPA's Registration of
2 Pesticides Containing Chlorpyrifos, Diazinon, and Malathion at 300.

3 37. Diazinon is semi-volatile and can become airborne after application. It has been
4 detected in the air near schools and homes in agricultural communities. For example, air
5 monitoring conducted by the California Air Resources Board in 1998 found detectable levels of
6 diazinon in the air at schools and other monitoring sites in Fresno County, California. A 2006
7 monitoring study PANNA conducted at the South Woods Elementary School in Hastings,
8 Florida, detected diazinon at quantities exceeding levels-of-concern for young children that were
9 derived from EPA data.

10 38. Diazinon is also frequently detected in surface waters. According to EPA,
11 "[d]iazinon was the most frequently detected insecticide in surface water monitoring
12 studies" Diazinon IRED at 11. According to NMFS, diazinon was detected in 67% of
13 surface water samples taken in California's salmon and steelhead habitat between 1990 and
14 2005. Draft Biological Opinion on EPA's Registration of Pesticides Containing Chlorpyrifos,
15 Diazinon, and Malathion at 225. Numerous waterbodies are listed as impaired pursuant to
16 section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), due to contamination of diazinon
17 from agricultural sources.

18 C. EPA's Reregistration Eligibility Decisions

19 39. EPA issued an interim reregistration eligibility decision for diazinon on July 31,
20 2002 ("Diazinon IRED"), which it revised on May 13, 2004 ("IRED Revision"). In those
21 decisions, EPA identified many "risks of concern" to farmworkers and wildlife resulting from
22 diazinon uses and prescribed mitigation to reduce these risks, including use of personal
23 protective equipment (such as chemical resistant clothing and respirators), use of engineering
24 controls (such as closed pesticide mixing, loading, and application systems designed to reduce
25 contact with the poisons), use restrictions, and reductions in maximum application rates. EPA
26 acknowledged that such mitigation would not eliminate the risks of concern to farmworkers and
27

1 wildlife but nonetheless concluded that such uses were eligible for reregistration under FIFRA.

2 40. Specifically, EPA found that all diazinon mixing, loading, and application
3 scenarios presented “unacceptable” risks of concern to farmworkers, even if EPA required use of
4 personal protective equipment. Diazinon IRED at 18. And even with implementation of
5 engineering controls, EPA found that 118 of the 136 short-term exposure scenarios presented
6 risks of concern to farmworkers who mix, load, or apply diazinon. See Diazinon IRED at 19-21.

7 41. EPA also concluded that diazinon uses posed “post-application” risks of concern
8 to farmworkers who come into contact with diazinon residues on crops following application.
9 EPA determined that up to 18-day “re-entry intervals” (period of time in which workers may not
10 enter fields treated with diazinon) and 45-day “pre-harvest intervals” (period of time in which
11 harvesting activities are prohibited following application) were needed to eliminate risks of
12 concern resulting from post-application activities. Diazinon IRED at 22-23.

13 42. EPA found that diazinon uses resulted in risks of concern to birds, mammals,
14 aquatic species, and threatened and endangered species. Diazinon IRED at 28-32. According to
15 the agency, “[d]iazinon has caused widespread and repeated mortality of birds [and that
16 m]ortality is likely to continue in the future if diazinon continues to be used on sites where birds
17 can be exposed.” Diazinon IRED at 31. EPA likewise acknowledged that “[d]iazinon is highly
18 toxic to bees and other beneficial insects on an acute contact basis,” is “moderately toxic to very
19 highly toxic to freshwater fish,” and “is very highly toxic to aquatic invertebrates on an acute
20 basis” Diazinon IRED at 26.

21 43. While EPA prescribed some mitigation to reduce farmworker and wildlife risks,
22 in many cases the agency carved out exceptions to the mitigation for specific diazinon uses. For
23 example, EPA cancelled all granular registrations of diazinon *except* for use on lettuce in
24 California and Arizona and for two current local registrations held by Washington and Oregon
25 for control of the cranberry girdler. IRED Facts at 3. Likewise, EPA eliminated aerial
26 application for all uses *except* for one application per crop for lettuce. IRED Facts at 3. EPA
27 similarly deleted foliar application on all vegetable and fruit crops *except* for leafhopper on
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1 honeydew melons in California and one application per crop for lettuce. IRED Facts at 3. And
2 EPA required closed cabs for motorized ground equipment application *except* for applications to
3 apples and lettuce. IRED Revision at 2.

4 44. EPA's primary justification for allowing diazinon risks of concern to persist, and
5 for exempting certain uses from the general mitigation measures prescribed in the IRED, was its
6 assertion that the benefits of diazinon to growers outweigh the risks from such uses. However,
7 EPA's conclusion that diazinon uses provided important benefits to growers is not substantiated
8 by the facts. For example, EPA conceded that only five percent of the honeydew melon crop is
9 treated with diazinon. Diazinon IRED at 6. The low usage of diazinon indicates that honeydew
10 growers have found efficacious alternatives to diazinon and that cancellation of the honeydew
11 use would not significantly affect grower revenues. Yet EPA allowed diazinon use on honeydew
12 to continue and, in the 2004 IRED Revision, extended the phase-out for foliar applications on
13 honeydew melons indefinitely. IRED Revision at 1.

14 45. Indeed, EPA assessed benefits for only a limited number of crops—those with
15 five percent or more of total acreage receiving diazinon treatments. Diazinon IRED at 42. Using
16 this cut-off, EPA did not conduct a benefits assessment for diazinon use on apples. Diazinon
17 IRED at 42. Nonetheless, EPA concluded that diazinon uses on apples are eligible for
18 reregistration, Diazinon IRED at 42, and, in the 2004 Revision, exempted apples from the
19 enclosed cab mitigation it prescribed for all other diazinon uses, IRED Revision at 1.

20 46. EPA's failure to consider the benefits of many diazinon uses was compounded by
21 the agency's failure to assess several important factors bearing on the risks that the pesticide
22 poses to humans. For example, EPA failed to consider diazinon exposures to children and
23 bystanders that occur when the pesticide drifts from the fields into homes, schools, and
24 playgrounds following application; EPA only considered child and bystander exposures from
25 food and drinking water contamination. See Diazinon IRED at 36-37. Both FIFRA and the
26 FFDCA require EPA to assess child and bystander exposures from pesticide drift; however, EPA
27 did not examine such exposures under either FIFRA's "unreasonable adverse effects" standard or
28

the FFDCA's "reasonable certainty of no harm" standard.

47. EPA failed to consider many other critical factors bearing on diazinon's reregistration eligibility, including but not limited to (a) the risks to humans and wildlife from the diazinon degradates, which EPA acknowledged could pose additional risks to both humans and wildlife; (b) the risks to humans and wildlife resulting from the endocrine disrupting properties of diazinon; (c) the post-application risks to farmworkers from nut tree and cut flower uses of diazinon; (d) waterbody listings under section 303(d) of the Clean Water Act caused by diazinon contamination from agricultural sources; (e) the acute toxicity of diazinon to estuarine and marine fish and invertebrates; and (f) the sub-lethal effects of diazinon on fish.

48. The Diazinon IRED was called "interim" because EPA still had to complete a cumulative risk assessment for all organophosphates and make appropriate adjustments in food tolerances in order to comply with the FQPA. On July 31, 2006, upon completing its Organophosphate Cumulative Risk Assessment, EPA re-affirmed its reregistration eligibility decisions for diazinon without change. It concluded that the Cumulative Risk Assessment compelled no changes in the Diazinon IRED and that the diazinon uses covered by the IRED continue to be eligible for reregistration. EPA Memorandum Finalizing IREDs for Organophosphate Pesticides (July 31, 2006). In making this determination, EPA did not address or incorporate new data that had been submitted to the agency following completion of the IRED on the risks and benefits of diazinon.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of FIFRA:

Failure to Consider All Factors Necessary to Evaluate "Unreasonable Adverse Effects" From Reregistering Diazinon

49. In order to register or reregister a pesticide use, EPA must determine that the use "will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. §§ 136a(c)(5). FIFRA defines "unreasonable adverse effects on the environment" to mean "any unreasonable risk to man or the environment, taking into account the economic, social, and

1 environmental costs and benefits of the use of any pesticide” 7 U.S.C. § 136(bb). In order
2 to satisfy this standard, EPA must consider all relevant health, environmental, economic, and
3 social risks and benefits of the pesticide use and determine that the benefits outweigh the risks.
4 The pesticide registrant bears the burden of proving that the benefits of a pesticide use outweigh
5 the risks.

6 50. In determining that diazinon uses are eligible for reregistration under FIFRA, and
7 in maintaining the diazinon registrations, EPA failed to place the burden of proving registration
8 eligibility on the pesticide registrants and failed to conduct a complete assessment of the risks
9 and benefits of diazinon uses. The critical omissions in EPA’s diazinon assessments include but
10 are not limited to EPA’s failure to consider and adequately assess: (a) risks to children and
11 bystanders from diazinon that drifts into communities following application; (b) risks to humans
12 and wildlife from the toxic degradates of diazinon; (c) risks to humans and wildlife from the
13 endocrine disrupting properties of diazinon; (d) risks to estuarine and marine fish and
14 invertebrates from diazinon runoff; (e) the sub-lethal effects of diazinon on wildlife; (f) surface
15 waters listed as impaired due to diazinon contamination from agricultural sources; and
16 (g) benefits of diazinon on crops such as apples for which less than five percent of total acreage
17 receives diazinon treatments.

18 51. Because EPA failed to consider and adequately assess many important factors
19 bearing on the risks and benefits of diazinon, including but not limited to those listed above, EPA
20 lacked a basis for determining that the benefits of diazinon uses outweigh the risks. By failing to
21 put the burden on the registrants to prove reregistration eligibility and conduct a complete risk-
22 benefit assessment that considers all important factors relevant to diazinon’s reregistration
23 eligibility, EPA’s decision that diazinon is eligible for reregistration was arbitrary, capricious,
24 and contrary to FIFRA.

SECOND CLAIM FOR RELIEF

Violation of FIFRA:Failure to Rationally Balance Risks and Benefits of Diazinon Reregistration

52. FIFRA defines “unreasonable adverse effects on the environment” to mean “any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide” 7 U.S.C. § 136(bb). In order to satisfy this standard, EPA must consider all relevant health, environmental, economic, and social risks and benefits of the pesticide use and determine that the benefits outweigh the risks. The pesticide registrant bears the burden of proving that the benefits of a pesticide use outweigh the risks.

53. Despite the flaws in EPA’s diazinon risk and benefit assessments, EPA admitted that some diazinon uses pose substantial risks to humans and the environment and provide only marginal benefits to growers. EPA proffered no rationale for how these marginal benefits outweigh the substantial risks posed by diazinon. EPA’s failure to articulate any rational connection between its risk and benefit findings and its ultimate decision that diazinon uses were eligible for reregistration was arbitrary, capricious, and contrary to FIFRA.

THIRD CLAIM FOR RELIEF

Violation of the Endangered Species Act:Failure to Consult on Impacts to Threatened and Endangered Species
From Registration of Diazinon

54. Under section 7(a)(2) of the ESA, “[e]ach federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2).

55. To fulfill the substantive mandate in section 7(a)(2), the ESA requires federal agencies to consult with the Services whenever a federal action “may affect” a listed species or designated critical habitat. 50 C.F.R. § 402.14(a). The threshold for a “may affect” determination and the required ESA section 7(a)(2) consultation is low. See 51 Fed. Reg. 19926, 19949 (June 3, 1986) (“Any possible effect, whether beneficial, benign, adverse or of an

undetermined character, triggers the formal consultation requirement.”).

56. In its reregistration eligibility decisions for diazinon, EPA found that uses of diazinon pose “risks of concern” to many threatened and endangered species. These findings equate to “may affect” findings and trigger the ESA consultation mandate. However, EPA has not completed any of the required diazinon consultations. And, since the 2002 diazinon reregistration decision, EPA has only begun to initiate consultations for a few of the many species that may be affected by diazinon. EPA’s failure to initiate and complete consultations on actions that “may affect” listed species violates the Endangered Species Act.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court:

A. Adjudge and declare that EPA acted arbitrarily, capriciously, and contrary to FIFRA in reregistering uses of diazinon;

B. Adjudge and declare that EPA violated section 7(a)(2) of the ESA by reregistering diazinon uses and maintaining diazinon reregistrations without initiating and completing consultations with the Services and without ensuring that the reregistered uses will not jeopardize the survival and recovery of threatened and endangered species or destroy or adversely modify their designated critical habitat;

C. Order EPA to either cancel diazinon or make a new reregistration eligibility decision for diazinon on an expeditious basis in which EPA: (1) makes unreasonable adverse effects determinations based on full consideration and balancing of environmental, health, economic, and social risks and benefits from diazinon uses, including all risks to children and other bystanders; (2) reregisters a diazinon use only when the pesticide registrants have proved that the health, environmental, economic, and social benefits outweigh the risks; and (3) ensures, based on completed section 7(a)(2) consultations, that the reregistered diazinon uses will not jeopardize the survival and recovery of threatened and endangered species or destroy or adversely modify their critical habitat;

1 D. Order EPA to consult with the Services pursuant to section 7(a)(2) of the ESA on
2 any diazinon uses that “may affect” a listed species and ensure, based on those consultations, that
3 the diazinon registrations will not jeopardize the survival and recovery of listed species or
4 adversely modify their critical habitat;

5 E. Order interim protective measures to prevent harm to farmworkers, children, and
6 other bystanders while EPA makes new reregistration decisions for diazinon;

7 F. Order interim protective measures to prevent harm to threatened and endangered
8 species and their designated critical habitat until the ESA section 7(a)(2) consultation process is
9 complete and EPA has brought diazinon registration into compliance with the ESA;

10 G. Award plaintiffs UFW, PANNA, PCUN, Beyond Pesticides, Teamsters Local
11 890, FLOC, and Luis Garcia Lopez their reasonable expenses, costs, and disbursements,
12 associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. § 2412;

13 H. Award plaintiffs UFW, PANNA, PCUN, Beyond Pesticides, Teamsters Local
14 890, FLOC, and their counsel Earthjustice and Farmworker Justice only, their reasonable fees,
15 including attorneys’ fees associated with this litigation, under the Equal Access to Justice Act,
16 28 U.S.C. § 2412;

17 I. Award plaintiff Beyond Pesticides its reasonable fees, expenses, costs, and
18 disbursements, including attorneys’ fees associated with this litigation under the citizen suit
19 provision of the ESA, 16 U.S.C. § 1540(g)(4);

20 J. Grant plaintiffs such further and additional relief as the Court may deem just and
21 proper.

Respectfully submitted this 4th day of August, 2008.

/s/ Kristen L. Boyles

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

I hereby certify that on August 4, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

No Appearances Have Been Filed

and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

Stephen Johnson
Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, D.C. 20460

- ☐ via facsimile
- ☐ via overnight courier
- ☒ via first-class U.S. mail
- ☐ via hand delivery
- ☐ via e-mail
- ☐ via electronic service by Clerk

I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct.
Executed on this 4th day of August, 2008, at Seattle, Washington.

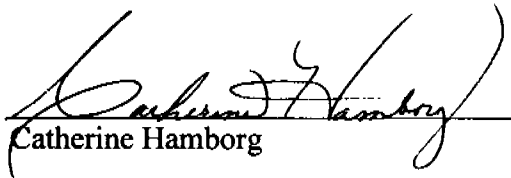

Catherine Hamborg

EXHIBIT A



EARTHJUSTICE

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
INTERNATIONAL JUNEAU, ALASKA OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.

May 27, 2008

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Stephen Johnson
Administrator
Environmental Protection Agency
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Carlos Gutierrez
Secretary of Commerce
U.S. Department of Commerce
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Washington, D.C. 20230

Dirk Kempthorne
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: 60-Day Notice of Endangered Species Act Violations Concerning EPA's
Reregistration of the Organophosphate Pesticide Diazinon

Greetings:

On behalf of Beyond Pesticides, we ask that the Environmental Protection Agency ("EPA") take immediate action to remedy its violations of the Endangered Species Act ("ESA"). EPA is in violation of section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), because it failed to consult with the Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively "the Services") to ensure that diazinon, an EPA-registered organophosphate pesticide, does not jeopardize listed species or adversely modify their designated critical habitat. Additionally, EPA is in violation of section 7(d) of the ESA, 16 U.S.C. § 1536(d), for allowing continued diazinon uses prior to completion of consultations it has initiated for Pacific salmon and steelhead, the California red-legged frog, and the Barton Springs salamander. This letter provides legal notice required by section 11(g) of the ESA, 16 U.S.C. § 1540(g), prior to commencement of legal action.

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BACKGROUND

Diazinon is an organophosphate insecticide that was first registered in 1956. Pursuant to an agreement with the diazinon registrants, EPA began a phase-out of residential uses of diazinon in 2000 due to the risks of diazinon to children and the environment. However, in 2002 and 2006, EPA reregistered agricultural uses of diazinon on many crops including but not limited to nuts, apples, pears, stone fruits, beets, onions, spinach, berries, grapes, broccoli, melons, cranberries, and lettuce. See Diazinon Interim Reregistration Eligibility Decision (“IRED”) at 19-21. Today, diazinon is one of the most common agricultural pesticides in the United States; approximately 4 million pounds of diazinon active ingredient are used annually.

Environmental contamination of diazinon is pervasive. The United States Geological Survey has determined that diazinon is one of the most commonly found insecticides in surface water nationally. Exposure to diazinon can harm wildlife by disrupting their nervous systems. Specifically, like other organophosphates, diazinon interferes with the acetylcholinesterase enzyme, which is necessary for normal transmission of nerve impulses. The mild symptoms of diazinon poisoning include headache, dizziness, weakness, feelings of anxiety, constriction of the pupils, and blurred vision. More severe symptoms include nausea, vomiting, abdominal cramps, slow pulse, diarrhea, pinpoint pupils, difficulty breathing, coma, and death. Exposure to diazinon is also linked to endocrine disruption, developmental effects, mutagenic effects, and cancer. According to EPA’s Ecological Incident Information System, diazinon has caused the second largest number of total known incidents of bird mortality of any pesticide.

In a 1989 Biological Opinion, FWS found that 132 listed species were potentially affected by diazinon use. Of these organisms, FWS listed 84 aquatic species as jeopardized, the majority of which were endangered or threatened species of freshwater fish. IRED at 31. While EPA has never imposed the mitigation measures prescribed in the 1989 biological opinion, between 2002 and 2007 EPA began to initiate consultations with NMFS and FWS after determining that diazinon may affect 26 listed salmon and steelhead populations, the California red-legged frog, and the Barton Springs salamander. Those consultations have never been completed.

EPA VIOLATED ESA § 7 BY FAILING TO CONSULT ON THE DIAZINON REREGISTRATION

I. LEGAL FRAMEWORK

The Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) prohibits the use of a pesticide in the United States unless EPA has registered the pesticide for the particular use. 7 U.S.C. § 136a(a). EPA may only register a pesticide use if it determines that “when used in

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accordance with widespread and commonly recognized practice” the pesticide “will not generally cause unreasonable adverse effects on the environment.” Id. at § 136a(c)(5). FIFRA defines “unreasonable adverse effects on the environment” to mean “any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide” Id. at § 136(bb).

After registering or reregistering a pesticide use, EPA retains discretionary involvement and control over that registration. EPA has the authority to cancel pesticide registrations whenever “a pesticide or its labeling or other material required to be submitted does not comply with the provisions of [FIFRA] or, when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment.” 7 U.S.C. § 136d(b). EPA must periodically review pesticide registrations, and should strive to complete such reviews every 15 years. Id. at § 136a(g)(1).

When EPA reregisters or maintains a pesticide registration under FIFRA, it triggers substantive obligations under section 7 of the ESA. 50 C.F.R. § 402.02; Washington Toxics Coal. v. EPA, 413 F.3d 1024, 1033 (9th Cir. 2005). Specifically, ESA § 7(a)(2) requires that “[e]ach federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2). The substantive obligation to “insure” against a likelihood of jeopardy or adverse modification requires the agencies to give the benefit of the doubt to endangered species and to place the burden of risk and uncertainty on the proposed action. See Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987). The duty imposed by section 7(a)(2) is constant, relieved only by an exemption from the Endangered Species Committee. 16 U.S.C. § 1536(h); Conner v. Burford, 848 F.2d 1441, 1452 n.26 (9th Cir. 1988).

To fulfill its substantive section 7(a)(2) obligation, the ESA requires federal agencies to consult with the Services on each agency action that “may affect” a listed species, such as a pesticide reregistration. See 50 C.F.R. § 402.14(a). The Ninth Circuit Court of Appeals has construed the term “action” broadly. See Pac. Rivers Council v. Thomas, 30 F.3d 1050, 1054-55 (9th Cir. 1994); Connor v. Burford, 868 F.2d 1441, 1453 (9th Cir. 1988). As a result of the consultation process, the federal agency that initiated the consultation will obtain either a written concurrence letter from NMFS or FWS that the proposed action is “not likely to adversely affect” listed species or their habitat, 50 C.F.R. §§ 402.13, 402.14(b)(1), or a biological opinion evaluating the effects of the federal action on listed species and their critical habitat. 50 C.F.R. § 402.14(a); see generally Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985). If NMFS or FWS concludes that a proposed action is likely to jeopardize a listed species or result in adverse modification of its critical habitat, NMFS or FWS must propose a reasonable and prudent alternatives, if available, that will mitigate the proposed action so as to avoid jeopardy and adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3).

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Section 7(d) of the ESA prohibits federal action agencies, after the initiation of consultation under section 7(a)(2), from making any irreversible or irretrievable commitment of resources if doing so would foreclose the implementation of reasonable and prudent alternatives. 16 U.S.C. § 1536(d); Natural Res. Defense Council v. Houston, 146 F.3d 1118, 1128 (9th Cir. 1998) (section 7(d) violated where Bureau of Reclamation executed water service contracts prior to completion of formal consultation); Marsh, 816 F.2d at 1389 (construction of highway outside species habitat barred by section 7(d) pending completion of consultation). This prohibition is not an exception to the requirements of section 7(a)(2); it is in addition to the requirements of section 7(a)(2) and helps to ensure that the section 7(a)(2) substantive mandate is met. See, e.g., Pac. Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994); Greenpeace v. NMFS, 80 F. Supp. 2d 1137 (W.D. Wash. 2000).

II. THE REREGISTRATION OF DIAZINON “MAY AFFECT” THREATENED AND ENDANGERED SPECIES AND ADVERSELY MODIFY THEIR DESIGNATED CRITICAL HABITAT

The threshold for a “may affect” determination and required section 7 consultation is low. See 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (“Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement.”). Reregistration of diazinon unquestionably “may affect” threatened and endangered species and their designated critical habitat. In reregistering diazinon, EPA acknowledged that the “risk quotients” for diazinon exceed endangered species “levels of concern” for birds, mammals, and aquatic invertebrates. IRED at 29-30. EPA takes the position that when a risk quotient for a pesticide use exceeds the level of concern the pesticide has the potential to adversely affect the subject species.

Diazinon is used in areas where listed species and their designated critical habitat occur. For example, in 2005, 402,321 pounds of diazinon were used on 719,165 acres throughout California. Diazinon is used in 49 of the 58 California counties, including Monterey, Fresno, Imperial, Kern, San Benito, Sutter, Santa Clara, San Joaquin, San Diego, and Stanislaus where the highest use occurs. PAN Pesticides Database, Diazinon Use Statistics for 2005.¹ More than 50 threatened and endangered species that live in California may be affected by diazinon, including but not limited to the endangered California condor, endangered southwestern willow flycatcher, threatened western snowy plover, and endangered peninsular bighorn sheep, each of

¹ Available at http://www.pesticideinfo.org/Detail_ChemUse.jsp?Rec_Id=PC35085 (last viewed Feb. 29, 2008).

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which live within one mile of diazinon uses. California Department of Pesticide Regulation, Species by Pesticide at 88-90.²

Diazinon use in other parts of the country also has the potential to harm listed species. For example, USGS estimates that over 23,000 pounds of diazinon active ingredient are applied annually within the New England coastal basins, which are the home to many listed species, including but not limited to the endangered Plymouth red-bellied turtle, endangered northern right whale, endangered shortnose sturgeon, threatened piping plover, and endangered Atlantic salmon.

III. EPA DID NOT COMPLETE CONSULTATION ON THE DIAZINON REREGISTRATION.

Despite the presence of threatened and endangered species in areas where diazinon is used, and EPA's acknowledgment that diazinon may affect endangered and threatened species, EPA did not consult with the Services to ensure that reregistering diazinon would not jeopardize listed species or adversely modify their critical habitat. This failure to consult on an action that "may affect" listed species violates section 7 of the Endangered Species Act.

Furthermore, while EPA has begun to initiate consultation on the effects of diazinon on 26 listed salmonid populations, the California red-legged frog, and the Barton Springs salamander, EPA has allowed continued use of diazinon without completing those consultations. As EPA continues to allow uses of this diazinon prior to completion of consultations, EPA is in violation of section 7(d) of the ESA.

* * *

Sincerely,



Joshua Osborne-Klein
Kristen L. Boyles

cc: Jay Feldman
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² Available at <http://www.cdpr.ca.gov/docs/endspec/espdfs/spxpest.pdf> (last viewed Mar. 11, 2008).

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